No. 11,388

In the United States Circuit Court of Appeals for the Ninth Circuit

WELLS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND SET ASIDE, AND ON REQUEST FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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No. 11388

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case comes before the Court upon a petition of Wells, Inc., pursuant to Section 10 (f) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*),[1] to review and set aside an order issued against it by the National Labor Relations Board pursuant to Section 10 (c) of the Act (R. 323–333, 342–345). In its answer, the Board has requested that the order be enforced (R. 334–342). The jurisdiction of this Court is based upon Section 10 (e) and (f) of the Act. The unfair labor practices found

[1] Relevant portions of the Act appear in the Appendix, *infra*, pp. 23–24.

by the Board occurred at petitioner's place of business in Reno, Nevada,[2] within this judicial circuit.

STATEMENT OF THE CASE

The Board's order (R. 29–31) is based upon findings[3] that petitioner discriminatorily discharged employee Jack Benton for the purpose of discouraging membership and activity in Local 801 of the International Association of Machinists, A. F. of L., hereinafter called the Union (R. 22, 27). The Board further found that by making disparaging remarks concerning the Union, by questioning employees regarding their union affiliation, and by other acts, petitioner interfered with, restrained, and coerced its employees in the exercise of rights guaranteed to them in Section 7 of the Act, in violation of Section 8 (1) of the Act (R. 25–26, 60–62, 65).[4] The order requires petitioner to cease and desist from the unfair labor practices found, to offer reinstatement and back pay to Jack Benton, and to post appropriate notices (R. 29–31).

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[2] Petitioner, a Nevada corporation, with its principal office and place of business in Reno, Nevada, is engaged in the transportation of freight by motor. During the twelve-month period ending June 30, 1945, petitioner transported 194,577 tons of freight, 72.8 percent of which was transported in interstate commerce. The foregoing facts are admitted and no jurisdictional question is presented (R. 4, 10).

[3] The Board in its decision, adopted the findings, conclusions, and recommendations of the Trial Examiner in his Intermediate Report with certain modifications expressly noted in the decision (R. 22).

[4] The Board dismissed the complaint insofar as it alleged that petitioner had violated Section 8 (5) of the Act by refusing to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit (R. 27–29, 31).

SUMMARY OF ARGUMENT

I. The Board's findings that petitioner has engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act are supported by substantial evidence.

II. The Board's order is valid and proper.

ARGUMENT

Point I

The Board's findings that petitioner has engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act are supported by substantial evidence

Introduction

The facts which give rise to the central issues in this case can be stated briefly. Petitioner, Wells, Inc., operates an interstate trucking business with branches at Reno and Luning, Nevada (R. 4, 10, 233–234). Another corporation, Wells Cargo, Inc., almost wholly owned by petitioner's stockholders and operated by petitioner's officers, maintains a repair shop at Las Vegas, Nevada (R. 250–251, 233). At Reno and Luning, petitioner employs line drivers, as well as repair and maintenance men such as machinists, washers, tire men, hostelers, greasers and parts men (R. 237–238, 266, 257, 263). During the periods here relevant, petitioner operated under contracts with the International Brotherhood of Teamsters, an affiliate of the American Federation of Labor, hereinafter called the Teamsters, covering the line drivers, grease men, tiremen and washers, employed at Luning (R. 260, 266, 268, 290), and the line drivers employed at Reno (R. 263, 290).

On May 16, 1944, petitioner's officers, on behalf of Wells Cargo, Inc., entered into a contract with the International Association of Machinists, hereinafter called the Machinists, covering all employees subject to the jurisdiction of that organization employed by Wells Cargo at Las Vegas (R. 144–145, 156–157, 233, 310–311).[5] At this meeting, the Machinists' representatives informed petitioner that they also represented the same categories of employees employed by Wells, Inc., at its Reno shops, and asked petitioner to enter into a contract for these employees, similar to the one which had just been negotiated covering the Las Vegas employees (R. 144–146). Although petitioner did not challenge the Machinists' claim to represent the maintenance employees at Reno, it balked at negotiating with that union on their behalf. R. 146–147). Aware that many of the maintenance men employed by Wells, Inc., at Luning were covered under the Teamsters' contract, petitioner was admittedly afraid that if it recognized the Machinists as bargaining representative for such employees at Reno, it would be faced with a jurisdictional dispute there (R. 237–

[5] There is no evidence in the record, and petitioner does not claim, that Wells Cargo or petitioner had a contract with the Teamsters covering any Las Vegas employees. The only contract which petitioner or any of its affiliates ever executed with the Machinists, so far as the record shows, is this Wells Cargo contract relating to the Las Vegas operation. The assertion in the dissenting opinion (R. 32), repeated by petitioner in its brief (p. 14), that petitioner had entered into a collective agreement with the Machinists covering employees in its Luning division is inaccurate. The reference cited by petitioner in its brief to support this assertion (R. 266) speaks of the Luning contract, dated July 3, 1945, between petitioner and the Teamsters. The record shows merely that at one time this contract between petitioner and the

238, Petitioner's brief, pp. 5, 16).[6] In the latter part of September or early October 1944, having stalled negotiations with the Machinists in the interim, petitioner's president, J. W. Wells, contacted Harry Anderson, the Teamsters' business agent at Reno, and inquired whether the Teamsters would object if petitioner recognized the Machinists as bargaining representative for the "greasers, washers and other men" employed at Reno, classifications which, at Luning, were represented by the Teamsters (R. 239). Anderson replied that these classifications "belonged" to the Teamsters, that the Teamsters would represent them and that petitioner "would get into trouble" if it "negotiated with the Machinists signing up these employees" (R. 239, cf. Petitioner's brief, pp. 5, 16).[7]

Teamsters covered "Mechanics" as well as other maintenance men, but that after the Machinists reaffiliated with the American Federation of Labor the Teamsters waived application of the contract as to "Mechanics," while retaining jurisdiction over the other maintenance men, such as greasers (R. 267–268).

[6] This, of course, was not the situation at Las Vegas, where petitioner did enter into a contract with the Machinists, since the Teamsters, so far as the record shows, did not claim to represent any of the employees there (see note 5, *supra*).

[7] In oral argument before the Board's Trial Examiner, petitioner's counsel summed up the situation we have described above as follows (R. 289–290):

"* * * the Teamsters, and it is common knowledge, ordinarily takes in greasers, washers, tiremen, and so forth. Mr. Wells knew that it was in his contract at Luning. He knew Teamsters claimed that. It is only natural, he did the natural thing in finding out if the Teamsters were going to claim the greasers and helpers. He didn't want a jurisdictional dispute. That is what he was trying to avoid because he knew immediately after talking to Mr. Anderson if he had gone ahead and recognized the Machinists for the greasers he was in trouble. Mr. Anderson was here at this hearing yesterday and I am convinced had the situation not been as it was, he would have come in here and protested."

Its fears having thus been confirmed, petitioner, instead of abiding by the desires of the Reno greasers and other maintenance employees involved, as the law requires, undertook a campaign to frustrate their selection of the Machinists as bargaining representative and to restrain and coerce them into repudiating that union.[8]

A. Interference, restraint, and coercion

Although in the initial conferences with the Machinists' representatives (*supra,* p. 4), Wells had accepted without question their claim to represent the Reno employees (R. 146, 122, 150), at a conference on October 5, 1944, he demanded proof that the employees desired to be represented by that union (R. 151). After examining the authorizations which McShane, the Machinists' representative, thereupon produced, Wells exclaimed, "Hell, you've got everybody on there but me" (R. 152). Nevertheless, Wells, again postponed action on the proposed contract, this time on the plea that Howard and Robert Wells, who were in

[8] The dissenting member of the Board, erroneously assuming that petitioner had entered into a contract with the Machinists at Luning (R. 32), where the Teamsters represented the line drivers and greasers, saw no reason to infer that petitioner would have been more opposed to dealing with the Machinists at Reno than at Luning since the threat of a jurisdictional dispute with the Teamsters, on that assumed state of facts, was, presumably, equally imminent at both places. He therefore concluded that petitioner's conduct at Reno was not intended to discourage membership in the Machinists. But since this inference rests completely on the assumption of a contract between petitioner and the Machinists at Luning, a fact which the record refutes (see note 5, *supra*), the argument falls. Moreover, unlike the situation at Reno, the record does not show that there was a jurisdictional dispute between the Teamsters and the Machinists over the representation of maintenance men, such as greasers, at Luning.

charge of the Reno operations, should participate in the negotiations (R. 153), and for two months thereafter successfully evaded the demands of the Machinists' representatives for further meetings (R. 162–166, 317–318). On December 22, 1944, at the instance of the United States Conciliation Service, whose assistance had been invoked by the Machinists, petitioner finally met again with the representatives of that union (R. 165–166). At the meeting Wells made it perfectly clear that under no circumstances would he enter into a contract with the Machinists covering the employees at Reno. He stated bluntly that rather than "submit to any of the conditions [that the Union] * * * asked" he would move the Reno operations to Salt Lake City (R. 169). During the course of the meeting, J. W. Wells left the conference, and, after questioning some of the Reno employees, returned half an hour later to announce that he had "found out that some of them didn't want the Union to represent them and that [Wells] would not at that time recognize [the Union] as representing his employees" (R. 167–168). Although the Commissioner of Conciliation suggested that the negotiations be continued, petitioner refused to resume discussion of the contract (R. 168–169).

During the months between September and December 1944, petitioner brought home to the employees directly, as well as to the representatives they had selected, its opposition to their choice of the Machinists to bargain for them. In September 1944, petitioner's secretary, Robert Wells, during a conversation with employee Benton which was held in the

presence of other employees on the day shift, stated that "Unions were lousy, Unions would keep a good man down and promote a sorry man. * * * Anytime a company that was working men couldn't fire a man without being told by the Union what to do, why it was a hell of a place to work" (R. 204–205). In December 1944, Robert Wells, referring to Benton's union button, asked Benton "what that yellow thing was on [his] * * * sweater," adding, "Did a bird fly over you?" (R. 206). It is not surprising that petitioner's animosity toward the Machinists was displayed in its attitude toward Benton in particular, for at the conference on December 22, President Wells stated that he regarded Benton as being "responsible for [petitioner's] * * * employees being members of the Union and wishing to be represented by it" (R. 168–169).

To make its hostility to the Machinists even more apparent, petitioner barred the Machinists' business representative from the Reno shop. Previously, petitioner had permitted the Machinists' representatives, as it permitted the Teamsters' representatives, to come to the shop during the lunch hour, to confer with the employees and collect dues (R. 123–124, 207–208). On one occasion in December 1944, when McKay, a business agent for the Machinists, entered the machine shop during the lunch hour, Robert Wells, petitioner's secretary, approached and brusquely informed him that he did not want him "in the shop bothering the men" and ordered him to "get out and stay out" (R. 123–124, 125–126, 207–208). The employees resented this discrimination against the Machinists' rep-

resentative; Benton objected to management that he did not understand why McKay could not collect dues in the shop when "the Teamster boss comes in here any time he wants to and talks for a long period of time" (R. 207–208).[9]

B. The discriminatory discharge of Benton

Following its refusal to negotiate further with the Machinists at the December 22 conference, petitioner, on January 31, 1945, climaxed its campaign to force the employees to forego representation by that union by discharging Benton. In attempting to explain this action as something other than a move to discourage the employees from continuing their affiliation with the Machinists, petitioner advanced reasons for the discharge so patently untenable as to leave no doubt in the minds of the employees that the sole motive which actuated petitioner in discharging Benton was petitioner's animus toward their affiliation with the Machinists (R. 25–26).

The circumstances were these: At the time of his discharge, Benton had been in petitioner's employ for a substantial period of time. He began working for petitioner as a mechanic on August 17, 1942, at a monthly salary of $250 (R. 189–190). In April 1943, petitioner promoted him to the position of foreman in charge of its repair shop (R. 189–190), at a salary of $325 per month (R. 192). As foreman, Benton supervised the work in the repair shop where petitioner's

[9] The organizer for the Teamsters Union commonly visited petitioner's shop and on occasion spent as much as 30 or 45 minutes talking with an employee, without objection from petitioner (R. 208).

trucks were serviced and repaired (R. 83) and had authority to hire and discharge employees which he exercised (R. 83–84). Some six or eight months after his promotion to the position of foreman, Benton's salary was raised to $350 per month (R. 192) and subsequently he received a further increase to $375 per month (R. 192). During the December 22 conference, J. W. Wells described Benton as "a first-class foreman" who did a "good job" for petitioner and whose "work was satisfactory in every way" (R. 168–169).

Benton had joined the Machinists in October 1942 (R. 193) and was one of its most active members. At the time of his discharge, he was union steward and trustee (R. 193) and he openly wore his union button most of the time while at work (R. 205). Benton had also spoken to rank and file employees about the Machinists and solicited some of them to join the Union (R. 216–217). That his wearing of the union button had attracted petitioner's attention is evident from the derogatory comment which Robert Wells had made to Benton in December 1944 concerning that "yellow thing" on his sweater (R. 206). Petitioner's strong animus against Benton because of his activities on behalf of the Machinists appears, moreover, from President Wells' resentful statement at the conference on December 22, that Benton was responsible for the employees' desire to be represented by the Machinists (*supra,* p. 8).

Late in December 1944 or early in January 1945, Benton spoke with his superior, Superintendent Divine, concerning his job as foreman. Benton told Divine that as foreman he received only $25 more than some

of the mechanics who were earning as much as $350 per month and that, unlike the ordinary mechanics, he received no extra compensation for the considerable overtime which it was necessary for him to work (R. 210–211). Benton then stated that he "wondered" whether Divine could obtain "a little more money" for him or if that was not possible, he "wondered if he could get another foreman and give [Benton] * * * a job back as a mechanic" (R. 210–211). Divine, who had already "indirectly" discussed with Benton the possibility of Benton working as a mechanic on the night shift with which petitioner was then having "quite a bit of trouble" since "qualified men" were not available, replied that he would see what he could do (R. 211). He told Benton that he thought that everything could be "arranged" and advised him not to worry (R. 211).

Benton heard nothing further until several weeks later on January 31. Five minutes before quitting time on that day, Divine told Benton that he was "relieved" of his "shop foreman duties" and that it would not "work out" for Benton to become a rank and file mechanic (R. 211). In response to Benton's question, "In other words, you mean that I am fired?", Divine replied, "If you look at it that way, yes." (R. 211–212). On February 6 or 7, when Benton returned to receive his final pay check and his tools, he was given a release slip by petitioner for presentation to the United States Employment Service office (R. 270–271, 212). This release slip stated that Benton had been "discharged for lack of cooperation" (R. 271).

At the hearing, petitioner offered no evidence whatever to support its claim that Benton had been guilty of "lack of cooperation." So far as appears from the record, the only conduct of Benton which could conceivably fall within that category was his activity on behalf of the Machinists. Obviously, in petitioner's eyes, his conduct in this respect was not "cooperative," because it did not comport with petitioner's policy of opposition to the Machinists as representative of the Reno employees.

Superintendent Divine, who testified at the hearing, attempted to attribute the discharge of Benton to the latter's request, made several weeks before, for a salary increase or a demotion (R. 220–222). Thus, on direct examination, Divine testified that Benton was discharged [10] because he wanted to be relieved of his job as a foreman and "go to work in the shop as a mechanic" (R. 221); that petitioner did not grant that request because the demotion of a foreman to a nonsupervisory position "has never worked out" (R. 221), allegedly because foremen, when demoted, "won't concentrate on the work" and are "constantly criticizing" (R. 225). On cross-examination, however, Divine admitted that his generalization was applicable only to cases where foremen had been demoted in-

[10] Petitioner's contentions concerning Benton are contradictory. Although at the oral argument before the Trial Examiner, petitioner took the position that it laid Benton off because he did "not want the job classification [petitioner desired] * * * him to have" (R. 292), subsequently in its brief in support of its exceptions to the Intermediate Report, petitioner asserted that Benton quit his employment (Br. p. 1). As indicated herein, the Board found that petitioner discharged Benton (*supra*, pp. 2, 9, *infra*, p. 14), and substantial evidence supports that finding.

voluntarily and that he had no evidence that the demotion of a foreman at his own request would prove unsatisfactory (R. 226). Apart from this admission, however, the evidence affirmatively shows that Divine had no real doubts about the feasibility of granting Benton's request for a demotion, for, when Benton requested the demotion, Divine had replied, "Well, I will see what I can do * * * I think everything can be arranged and don't worry" (R. 211). Indeed, Divine had himself made the suggestion "indirectly" that Benton resume work as a mechanic on the night shift since petitioner "was having quite a little bit of trouble" and "didn't have the qualified men" (R. 210–211). At no time during the intervening weeks prior to his summary discharge on January 31, did Divine indicate to Benton that he had changed his mind as to the propriety of such a transfer (R. 211).

But even assuming that petitioner would have had grounds for refusing to demote Benton as he requested, such grounds could not, under any circumstances, have been the basis for Benton's abrupt dismissal from his position as foreman. In asking for an increase in salary or for demotion to the job of a rank and file mechanic, Benton did not condition his continued employment upon the granting of either request. His requests were not given as an ultimatum (R. 210–211). To the contrary, his language was tentative and he "wondered if [he] * * * could get some more money. If that wasn't satisfactory [he] * * * wondered if [Divine] * * * could get another foreman and give [him] * * * back a job as mechanic" (R. 210–211). Nor did Superin-

tendent Divine regard Benton's requests as an ultimatum that he would resign in the event neither request was granted. Divine, as set forth above, told Benton on January 31, 1945, that he was "relieved" of his duties as foreman and that he could not work as an ordinary machanic. When Benton asked whether Divine meant that he was "fired", Divine replied, "If you look at it that way, yes." (*supra,* p. 11).

The discharge of Benton, an admittedly competent employee who had repeatedly been given increases in salary, at a time when the manpower shortage was acute throughout the country and petitioner admittedly "didn't have the qualified men" (R. 211), thus stands utterly unexplained by petitioner. The record leaves open no inference other than the one drawn by the Board, that petitioner used the situation created by Benton's alternative requests for an increase in pay or a demotion "as a pretext for terminating Benton's employment in order to discourage union membership" (R. 23).

C. The illegality of petitioner's conduct

The evidence set forth above demonstrates conclusively, as the Board found (R. 25), that petitioner was opposed to the selection of the Machinists as bargaining agent by the employees in its Reno shop. To destroy the status of that union among the Reno employees, petitioner engaged in dilatory and evasive bargaining tactics, and finally broke off negotiations with the union completely; it questioned employees about their union affiliation, made disparaging re-

marks concerning the Machinists, discriminatorily denied access to the shop to the Machinists' representative, and finally, discharged Benton (*supra,* pp. 6–14). The tendency of such a course of conduct to have its desired effect and its consequent illegality under the Act are not open to question. *N. L. R. B.* v. *Walt Disney Products,* 146 F. 2d 44, 49 (C. C. A. 9) cert. denied, 324 U. S. 877. Nor is it any defense to petitioner that its conduct may have been motivated not by hostility to unionization as such, or even by hostility to the Machinists generally, but rather by a desire to avoid the reprisals which the Teamsters had threatened if petitioner honored its employees' choice of bargaining representatives at the Reno shop.

Hardships which would be imposed upon an employer by a rival union if the employer obeyed his obligations under the Act do not exculpate an employer who uses coercion, intimidation or discrimination to relieve himself of those obligations. *N. L. R. B.* v. *Star Publishing Co.,* 97 F. 2d 465, 471 (C. C. A. 9); *N. L. R. B.* v. *Hudson Motor Car Co.,* 128 F. 2d 528 (C. C. A. 6); *N. L. R. B.* v. *Gluek Brewing Co.,* 144 F. 2d 847 (C. C. A. 8). As this Court said in the *Star Publishing* case: "The Act prohibits unfair labor practices in all cases. It permits no immunity because the employer may think that the exigencies of the moment require infraction of the statute. In fact, nothing in the statute permits or justifies its violation by the employer."

At the oral argument before the Trial Examiner, petitioner contended for the first time that even if it

discharged Benton discriminatorily, nevertheless the discharge was not cognizable under the Act because, since Benton was a foreman, his activities among rank and file employees on behalf of the Machinists were not protected by the Act (R. 290–292). And in its brief before this Court, petitioner rests heavily upon that contention, asserting in addition that it was bound by the Act to terminate Benton's unlawful activities (p. 12); that it could properly have accomplished that objective by discharging Benton (p. 16); and that the Board's holding that Benton's discharge was violative of Section 8 (3) of the Act constitutes an unwarranted invasion of petitioner's "managerial prerogative" to determine for itself how best to avoid charges of lack of neutrality as between rival labor organizations (p. 16).

In the first place, petitioner has never contended, in fact it expressly denied, that it discharged Benton to protect its neutrality or because it believed that Benton's activities were illegal and might involve petitioner in unfair labor proceedings under the Act (R. 291–292).[11] Petitioner's contention, therefore, that

[11] The assertion in the opinion of the dissenting member of the Board, repeated in petitioner's brief, pp. 16–17, that petitioner's counsel, at oral argument before the Trial Examiner, stated that prior to Benton's discharge he had advised petitioner that Benton's conduct was compromising its neutrality and might subject petitioner to charges of unfair labor practices, is not borne out by the record. The record shows that not only did petitioner's counsel not so advise Wells prior to Benton's discharge, but indeed that he did not then even know of Benton's activities which petitioner now claims it considered illegal. At the oral argument petitioner's counsel said in this connection: "*If I had known about it*, I certainly would have advised the Company to discharge any fore-

since Benton's activities were illegal, petitioner would have been justified in discharging him on that account, is irrelevant here. The Board did not deny that an employer, to protect his neutrality, could take such appropriate disciplinary action against offending foremen as the employer saw fit (R. 26, note 4). It did not attempt to assess the propriety or impropriety of petitioner's discharge of Benton as a measure to preserve petitioner's neutrality or to vindicate the rights of rank and file employees to full freedom of choice of representatives under the Act. Since petitioner discharged Benton not for this reason, but solely to discourage the employees at Reno from affiliating with the Machinists, the Board's determination that the discharge violated Section 8 (3) was predicated not on a consideration of the nature or propriety of the possible remedy petitioner might have invoked to accomplish a permissible objective, but upon the fact that the discharge was actually effected as economic reprisal aimed at accomplishing a forbidden objective (R. 25–27).

Nor is there merit in petitioner's argument that because Benton's activities among rank and file employees on behalf of the Machinists were not protected

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man who is for or against any labor organization" (R. 291–292). Interestingly enough, petitioner did not follow this advice, for another of its foremen, who was also a member of the Machinists, but apparently by no means as active on its behalf as Benton, was not discharged, reprimanded in any way, or even cautioned to refrain from unneutral conduct (Petitioner's brief, p. 14). This, of course, provides further evidence, if more were needed, that petitioner was not motivated in discharging Benton by any concern over the possible coercive effects of his conduct on the rank and file, or by a desire to avoid charges of unfair labor practice.

by the Act, the Board could not properly find that by discharging Benton for engaging in such activities, petitioner violated the Act. The literal language of Section 8 (3) prohibits discrimination "to * * * discourage membership in a labor organization." Petitioner's ~~discharge~~ disadvantage of Benton, tested both by its purpose and by its normal and necessary effect, falls squarely within that statutory prohibition. By discharging Benton, petitioner, as the Board found (R. 27), sought to discharge *the rank and file employees* at Reno from affiliating with the Machinists.[12] The discharge, so patently discriminatory, could hardly fail to have that effect.

Whether or not Benton himself, as a foreman, is entitled to protection against employer coercion and discrimination in becoming a member of the Machinists, or selecting that union as his bargaining representative, it is perfectly clear that petitioner's rank and file employees are entitled to such protection. Petitioner, by discharging Benton, and thus giving the ordinary employees an object lesson concerning the

[12] Petitioner's contention (brief, pp. 11–18), that the Board could not properly have found that its conduct tended to discourage rank and file employees, as well as foremen, from becoming and remaining members of the Machinists is utterly without merit. Petitioner's hostile attitude toward the Machinists as bargaining agent for the Reno employees was made abundantly apparent to the rank and file employees. And at no time did petitioner indicate to them, or even to Benton himself, that its animus toward Benton for supporting the Machinists stemmed from the fact that Benton was a foreman rather than a rank and file employee. Under these circumstances, the employees could not have failed to conclude that Benton was made the object of petitioner's retributive displeasure, not because he was a foreman, but simply because he was an outstanding advocate for the Machinists.

dangers of affiliation with the Machinists, infringed their right freely to select the Machinists as their bargaining representative, and in so doing, violated the Act.[13] What petitioner's contention really amounts to is that since Benton participated in inducing employees to join the Machinists in the first place and their selection of that organization therefore was not to be deemed wholly voluntary, petitioner was entitled to dissipate the effects of Benton's interference by intimidating the employees to revoke their selection.

But it does not follow that because employees may not have been entirely free from the influences of employer economic power when they first selected a particular labor organization to bargain for them, the employer is therefore entitled to utilize his economic power to restrain them forever after from voluntarily selecting that organization to bargain for them. In cases where the Board finds that an employer has granted assistance to a nationally affiliated labor organization in obtaining adherents among employees, it orders the employer to cease and desist from rendering such assistance, and to refrain from recognizing the organization until it has been certified by the

[13] Compare *N. L. R. B.* v. *Whiting Mead Co.*, 148 F. 2d 817 (C. C. A. 9), enforcing 45 N. L. R. B. 987, 1015–1018; *N. L. R. B.* v. *American Potash & Chemical Corp.*, 98 F. 2d 488, 493 (C. C. A. 9), cert. denied, 306 U. S. 643; *N. L. R. B.* v. *Richter's Bakery*, 140 F. 2d 870 (C. C. A. 5), cert. denied, 322 U. S. 754, enforcing, 46 N. L. R. B. 447, 450, 474–479; *N. L. R. B.* v. *Walt Disney Products*, 146 F. 2d 44, 49 (C. C. A. 9) cert. denied, 324 U. S. 877. See also the Board cases cited in note 5 of the Board's opinion (R. 26–27) and their treatment by the dissenting member of the Board in note 11 of his opinion (R. 35–36), where he indicates that if he agreed with the Board's view of the facts in the instant case, he would concur in the holding.

Board.[14] In no case, not even one involving a company-dominated union, has the Board ever authorized an employer, by discharge or other exercise of economic power, to coerce employees not to join or to withdraw from a particular labor organization. And it could not do so, because Section 8 (3) of the Act prohibits such conduct in unequivocal terms.

In the instant case, the Board took cognizance of the fact that Benton's activities on behalf of the Machinists tended unduly to influence employees to join that organization. And it undertook to remedy that invasion of the freedom of employees by refusing to accord to the Machinists the status of exclusive bargaining representative under the Act and refusing to order petitioner to bargain with that organization.[15] But it did not deny to the employees the right freely to select the Machinists as their bargaining representative, nor could it sanction conduct of peti-

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[14] *Matter of Serrick Corp.*, 8 N. L. R. B. 621, 652–655, enforced, *sub nomine*, *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72; *Matter of Fine Art Novelty Corp.*, 54 N. L. R. B. 480, 487; *Matter of Ever-Ready Label Corp.*, 54 N. L. R. B. 551, 559–560; *Matter of Houston Shipbuilding Corp.*, 56 N. L. R. B. 1684, 1687–1688; *Matter of Midwest Piping & Supply Co.*, 63 N. L. R. B. 1060, 1076–1077.

[15] It should be noted here that petitioner at no time took any action to dissipate the effects of Benton's interference. Not only did it never openly reprimand Benton for his conduct or tell him to desist, but, more significantly, it never informed the employees that Benton would be overruled by management if ever he attempted to use his power as foreman in such a way as to influence them to join the Machinists. Even petitioner's refusal to negotiate with the Machinists was never predicated upon the theory that their majority status was tainted by Benton's support, but stemmed solely from petitioner's desire to avoid dealing with the Machinists at all lest it thereby incur the displeasure of the Teamsters. *Supra*, pp. 4–6.

tioner which tended to have that effect. The Board found it essential to effectuate the policies of the Act that the effects of petitioner's object lesson of reprisal against employees who affiliated with the Machinists be dissipated (R. 25–27), and for this purpose ordered petitioner to reinstate Benton with back pay.

Finally, petitioner contends that the effect of reinstating Benton will be to "give a stamp of approval of Benton's activities in interfering with free and untrammeled rights of the employees to belong to any labor organization which they may desire to choose" (Brief, p. 21). Nothing could be further from the fact. As we have indicated, the Board's order itself denied exclusive bargaining status to the Machinists because it found that Benton's activities impinged upon the freedom of choice of the rank and file employees. That is ample demonstration to petitioner, to Benton, and to the employees, that the Board did not put "a stamp of approval" on Benton's activities. Upon Benton's reinstatement, petitioner will be perfectly free to comply with its statutory duty to require Benton to refrain from engaging in coercive activities among the rank and file employees on behalf of or against any labor organization, and to take such appropriate disciplinary action as it may believe necessary if Benton fails to obey. The Board has not, in this or any other case, found that action by an employer intended to protect the employer's neutrality against compromise by supervisors constituted an unfair labor practice under the Act. Since petitioner's argument rests entirely on the utterly unwarranted assumption that the Board did so in this case, it is obviously without merit.

Point II

The Board's order is valid

The Board's order (R. 29–31) directs petitioner to cease and desist from interfering with, restraining or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act, to reinstate Benton with back pay, to cease and desist from interrogating employees concerning their union membership, from threatening employees with economic reprisal to discourage union activity, and from otherwise interfering with the rights of employees under the Act, and to post appropriate notices. The Board's order is "adapted to the situation which calls for redress" (*N. L. R. B.* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 348), and, apart from contesting the validity of the findings on which it rests, petitioner does not challenge its propriety.

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence, that its order is valid and proper in all respects, and that a decree should issue enforcing the order in full.

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APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce.

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair

labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

* * * * *

(e) The Board shall have power to petition and circuit court of appeals of the United States wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

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